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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE CASTELLANOS, Defendant and Appellant.	B284666 (Los Angeles County Super. Ct. No. BA446622)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura F. Priver, Judge. Affirmed and remanded with directions.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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Jose Castellanos (defendant) appeals from a judgment entered following a jury trial that resulted in his conviction of attempted second degree robbery as an aider and abettor (Pen. Code, §§ 662, 211),[1] assault with a semiautomatic firearm as an aider and abettor (§ 245, subd. (b)), possession of a firearm by a felon (§ 29800, subd. (a)(1)), and dissuading a witness (§ 136.1, subds. (b), (c)).

On appeal, defendant contends his convictions must be reversed because the trial court erred by admitting evidence of: (1) a prior robbery to prove intent pursuant to Evidence Code section 1101, subdivision (b); and (2) a recorded jailhouse conversation between his codefendant, Jonathan Noriega (Noriega),[2] and an informant.

Defendant also originally argued that the five-year enhancement added to his sentence pursuant to section 667, subdivision (a)(1) [3] must be stricken because it was based on his conviction for being a felon in possession of a firearm, which is not listed as a "serious felony" under the statute. During oral argument, we solicited supplemental briefing from the parties as

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Noriega is not a party to this appeal.

[3] Section 667, subdivision(a)(1) states in pertinent part: "Any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

to whether this case must be remanded for resentencing due to the recent amendment to section 667, subdivision (a), which ended the statutory prohibition on a trial court's ability to strike a prior serious felony conviction for purposes of enhancement of a sentence. Defendant now concedes that section 667, subdivision (a)(1), is applicable to his sentence. Defendant and the People agree that this case should be remanded for resentencing.

We agree with the parties that the matter must be remanded to have the trial court exercise its newfound discretion to strike defendant's prior serious felony conviction under Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393), but we otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[4]

The People's Evidence

1. The May 4, 2016 Incident

Michael M. (Michael), the victim, is a detective with the Los Angeles Police Department (LAPD). That morning, Michael was on his way to work, carrying a backpack and a "semi-auto" nine-millimeter gun in a holster on his hip. During his walk, he heard footsteps behind him and noticed a young male (later determined to be Noriega) about 15 feet away. Once Michael crossed the street, he heard somebody say "hey," and when he turned around, he saw Noriega running towards him, pulling a handgun out of a holster.

After a brief exchange of words, Michael pulled the trigger of his weapon, aiming at Noriega's stomach. Noriega screamed, back pedaling with his gun still pointed at Michael. Michael then fired a second round towards Noriega. This time, Noriega fell

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[4] The factual summary is mainly focused on facts related to the issues on appeal.

backwards onto the pavement, knocking the gun out of his hand. Noriega then got up and ran about 40 to 50 feet down the street towards the passenger side of a silver vehicle, later determined to have been driven by defendant.

2. The Investigation

On May 6, 2016, two days after the incident, Ruth M. (Ruth) was arrested driving a silver Chrysler 300, which was impounded. The police also confiscated Ruth's cell phone, which contained text messages between herself and defendant, known by the gang moniker "Lost." Ruth was "affiliated" with the La Mirada Locos gang. Both defendant and Noriega were members of that gang.

On May 3, 2016, the day before the incident, defendant sent Ruth a text message asking to borrow her vehicle. That evening, Ruth gave the keys to her vehicle to Noriega. The vehicle was returned to Ruth the next morning.

3. Noriega's Recorded Jailhouse Conversation

On May 12, 2016, Noriega was arrested and placed in a jail cell with an informant. The conversation was recorded. When asked what he was "busted for," Noriega told the informant: "we" tried to rob an "off-duty" cop, and "I told him: Give me your backpack, fool . . . and he just started shooting." Noriega further stated that he was in jail with a "big homie" named "Lost." They used "the homegirl['s]" vehicle, but Lost never got out of the vehicle.

4. Defendant's 2011 Prior Robbery Conviction

On January 31, 2011, Salvador F. (Salvador) was at a family arcade in the City of Los Angeles. He rode his bike to the arcade. At some point, he went outside the arcade to check on his bike. While outside, Salvador was approached by two men, one of whom was defendant. Defendant, standing a few inches away from Salvador, demanded that he empty his pockets. Salvador felt threatened, emptied his shirt pocket, and handed defendant some change he had for the arcade and his cell phone. Defendant was subsequently convicted of the robbery.

The Verdict and Sentencing

Following a jury trial, defendant was convicted of attempted second degree robbery as an aider and abettor (§§ 662, 211; count 1), assault with a semiautomatic firearm as an aider and abettor (§ 245, subd. (b); count 2), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 4), and dissuading a witness (§ 136.1, subds. (b), (c); count 5).[5] The jury found true allegations that defendant personally used a firearm as to count 1 (§ 12022.53, subds. (b), (e)(1)) and threatened to use force as to count 5. The jury found true allegations that defendant committed counts 1, 2 and 5 for the benefit of a street gang. (§ 186.22, subds. (b)(1)(B) & (C).)

Outside the presence of the jury, defendant admitted he suffered a prior strike pursuant to the "Three Strikes" law (§§ 667 subds. (b)-(i), 1170.12, subds. (a)-(d)) and served a prior prison term (§ 667.5, subd. (b)).

The trial court sentenced defendant to a total term of 48 years four months to life in state prison, comprised of the high term of nine years for count 2 (assault with a semiautomatic firearm), doubled as a result of the prior strike, plus five years for the gang enhancement, and a consecutive one-third the midterm of eight months for count 4 (felon in possession of a firearm), doubled as a result of the prior strike. The trial court added a

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[5] Defendant was not charged with a count 3.

consecutive five-year enhancement pursuant to section 667, subdivision (a)(1). The court imposed an indeterminate consecutive seven years to life for count 5 (dissuading a witness), doubled as a result of the prior strike, plus a consecutive five-year enhancement pursuant to section 667, subdivision (a)(1). The trial court stayed sentences on count 1 (attempted robbery) and the prior prison term enhancement pursuant to section 654.

Defendant filed a timely notice of appeal.

DISCUSSION

I. Defendant's 2011 Prior Robbery Conviction

Defendant contends the trial court abused its discretion by admitting evidence of his 2011 prior robbery conviction. According to defendant, his "prior robbery bore little resemblance to the attempted robbery by Noriega that he aided and abetted in this case."

A. Standard of Review

"We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352." (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) A trial court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

B. Background

Prior to trial, the People filed a motion, which sought to introduce evidence of defendant's 2011 robbery conviction pursuant to Evidence Code section 1101, subdivision (b), on the grounds that the underlying conduct of defendant's prior robbery was relevant to show intent. According to the People, intent was an issue in this case because defendant "stay[ed] in the car" so the prior robbery would show defendant "wasn't just driving and didn't know what [] Noriega was doing."

Defense counsel objected, arguing the prior robbery did not prove intent, and was instead being used as a "back doorway to introduce character evidence on [defendant]."

The trial court agreed with the People and granted the motion, ruling defendant's prior robbery conviction was relevant to show intent because he was being charged as an aider and abettor in this case. The trial court further determined that although the evidence was "clearly prejudicial," its probative value outweighed its prejudicial effect and would not "overwhelm[]" the jury since the People would only call two witnesses, the testimony would not be "terribly time consuming," and the jury instructions would specifically limit the consideration of the evidence to intent so the jury would not be confused.

C. No Abuse of Discretion

Under Evidence Code section 1101, subdivision (a), evidence of specific instances of a defendant's conduct is inadmissible to prove the defendant's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Notwithstanding this prohibition, under Evidence Code section 1101, subdivision (b), evidence that a defendant "committed a crime, civil wrong, or other act" is admissible to prove some fact other than criminal disposition, for example, to prove intent. (Evid. Code, § 1101, subd. (b).)

"To be admissible, there must be some degree of similarity between the charged crime and the other crime, but the degree of similarity depends on the purpose for which the evidence was presented. The least degree of similarity is needed when, as here, the evidence is offered to prove intent." (*People v. Jones* (2011) 51 Cal.4th 346, 371.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).)

Additionally, "to be admissible such evidence 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Thus, "[t]he probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp* (1998) 18 Cal.4th 349, 371; Evid. Code, § 352.)

Here, the 2011 robbery and the current robbery were sufficiently similar to support the inference that defendant intended to rob. In both robberies, defendant targeted a pedestrian. Also, defendant did not act alone, but was accompanied by another individual. We therefore reject defendant's contention that the robberies were too dissimilar to be admissible because defendant directly participated in the prior robbery and did not use a weapon; while in this case, defendant was the driver of the vehicle and did not accost the victim. The two crimes do not need to be identical in order to be relevant, especially here when the uncharged crime is offered to prove intent. (*People v. Delgado* (1992) 10 Cal.App.4th 1837, 1845 ["when the other crime evidence is admitted solely for its relevance to the defendant's intent, a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant"].)

We also reject defendant's contention that the uncharged crime was used to prove bad character. As the People point out, the jury instructions properly limited the jury's consideration of the prior robbery to prove intent. We presume the jury understood and followed the trial court's instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 ["Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions."])

Finally, we agree with the trial court that the probative value of the 2011 robbery evidence was not substantially outweighed by the risk of unfair prejudice under Evidence Code section 352. There was nothing about the prior robbery that made it more inflammatory than the current robbery such that it created an emotional bias against defendant. (*People v. Johnson* (2013) 221 Cal.App.4th 623, 636 ["""The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues."""]) Also, because the jury knew defendant had already been convicted of the prior robbery, the "prejudicial impact of the evidence . . . decrease[d]" since the jury was not "tempted to convict defendant of the charged offenses, regardless of his guilt, in order to assure that he would be punished for the uncharged offenses[.]" (*People v. Balcom* (1994) 7 Cal.4th 414, 427.) Lastly, the evidence was highly probative to prove defendant's intent since there was an issue as to whether defendant, the driver of the vehicle, knew that Noriega intended to commit a robbery.

Accordingly, the trial court properly exercised its discretion in admitting evidence of defendant's 2011 prior robbery conviction.

II. Noriega's Recorded Jailhouse Conversation

Defendant contends the trial court's admission of Noriega's recorded jailhouse conversation with the informant violated his rights under the Sixth and Fourteenth Amendments. Although defendant concedes that Noriega's statements were nontestimonial, and thus outside the scope of the confrontation clause pursuant to our Supreme Court precedent, he argues we should revisit the issue.

Specifically, defendant contends "the evils remedied by the *Aranda/Burton* doctrine should not be limited to testimonial confessions by co-defendants."[6] We previously declined to apply the *Aranda/Burton* doctrine to nontestimonial statements in *People v. Washington* (2017) 15 Cal.App.5th 19, 28–31 (*Washington*), and see no reason to depart from our reasoning in *Washington*.

Accordingly, we conclude the trial court properly admitted the evidence.

III. Defendant's Prior Serious Felony Conviction Enhancement

We agree with the parties that this case must be remanded for resentencing to allow the trial court to exercise its discretion under the recent amendment to section 667, subdivision (a).

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[6] *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*), abrogated in part by California Constitution, article I, section 28, subdivision (d), and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

At the time defendant was sentenced, the trial court was prohibited from striking the five-year prior serious felony conviction enhancement imposed in this case under section 667, subdivision (a)(1). The trial court advised defendant of its sentencing limitation on the record, stating: "the five-year prior the court has no discretion."

On January 1, 2019, SB 1393 took effect and amends sections 667, subdivision (a) and 1385, subdivision (b). In particular, SB 1393 eliminated the prohibition against striking a prior serious felony conviction.

In supplemental briefing, the parties agree that SB 1393 applies retroactively and may apply to defendant because his conviction was not final as of the effective date of the amendment. We agree with the parties. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 ["It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply"]; *People v. Brown* (2012) 54 Cal.4th 314, 323.) In enacting SB 1393, the Legislature did not expressly declare or in any way indicate that it did not intend SB 1393 to apply retroactively. Because defendant's appeal was not final when SB 1393 went into effect on January 1, 2019, the trial court here should have the opportunity under the new law to strike the five-year enhancement imposed based on defendant's prior serious felony conviction.

Accordingly, we remand this matter for resentencing to allow the trial court to consider whether the enhancement under section 667, subdivision (a)(1), should be stricken pursuant to SB 1393.

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to exercise its discretion under section 667, subdivision (a). The judgment is otherwise affirmed.

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_______________________, J.
ASHMANN-GERST

We concur:

________________________, P. J.
LUI

________________________, J.
CHAVEZ